No. 85-1356

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SILAS J. ALEXANDER, et al.,

Petitioners,

v.

CHICAGO PARK DISTRICT, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the affirmance of the denial of motions to disqualify the trial judge, because of his alleged civic association with one of the defendants over 25 years ago, was an abuse of discretion which merits the review of this Court.

PARTIES BEFORE THE COURT OF APPEALS

The Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh, all respondents herein, and William A. Lee, now deceased, were named as appellees before the court of appeals.

The appellants below were Silas J. Alexander and others,[1] petitioners herein.

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[1] The other petitioners who were named-plaintiffs before the district court are Karen Turner, Renee Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillon, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fischer, Agnes Bernaugh, William Hall, Charles Adkins and Natalie Lyle.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh respectfully pray that a writ of certiorari not issue to review a portion of the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 773 F.2d 850. (App. 1). A prior interlocutory appeal to the court of appeals is reported at 709 F.2d 463 (App. 2) and a pretrial ruling of the district court is reported at 548 F.Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. The court of appeals denied a timely petition for rehearing by order entered on November 13, 1985. The petition for certiorari was not filed within ninety (90) days of the denial of rehearing and respondents challenge the Court's jurisdiction under 28 U.S.C. § 1254(1) as alleged by petitioners.[2] In any event, this brief has been filed within thirty (30) days of the receipt of the petition on February 12, 1986.

STATUTES AND CIRCUIT RULE INVOLVED IN THE CASE

28 U.S.C. § 144 provides in pertinent part:

> "Bias or prejudice of judge
>
> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

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[2] Respondents refer to a "Motion and Application to Individual Justice in accordance with Rule 43 of the Rules of the Supreme Court" filed on or about February 28, 1986 by petitioners which reflects facts demonstrating an untimely filing of the petition. On March 10, 1986 respondents were informed by the Clerk of the Court that the Court intends to treat the instant petition as a cross-petition to a timely filed petition for writ of certiorari filed on February 11, 1986 by respondents.

28 U.S.C. § 455(a) provides in pertinent part:

> "Disqualification of justice, judge, or magistrate
>
> "a. Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

7th Circuit Rule 18 provides:

> "CIRCUIT RULE 18. Reassignment of Remanded Cases
>
> "Whenever a case tried in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case. In appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand."

STATEMENT OF THE CASE

The statement presented by petitioners is argumentative and incomplete. The respondents must, therefore, set forth this statement of the case.

I. THE PARTIES

A. Respondents

The Chicago Park District was created by Illinois law in 1933 (Ill.Rev.Stat. ch. 105, § 333.1) and supports itself from public funds. It is responsible for a myriad of functions within the City of Chicago including the operation of zoos, parking garages, harbors and parks, playgrounds and playlots. The Chicago Park District is governed by a Board of Commissioners who serve without compensation. Respondents O'Malley,

Jones, Foran, Marovitz, McGowan, Simon, Bartholomay and McHugh are past or present members of the Board of Commissioners. Respondent Kelly has been the General Superintendent of the Chicago Park District and has been responsible for its day-to-day management.

B. The Petitioners

The Petitioners have been certified as a class consisting of all black and Hispanic residents of the City of Chicago who allegedly have been injured by the acts of the respondents. The class purports to be represented by 27 named-plaintiffs.

II. PETITIONERS' COMPLAINTS

The class-wide allegations of the petitioners ("Alexander") were filed on June 29, 1979. Alexander made several amendments to his complaint, ultimately asserting under 42 U.S.C. section 1983 four counts against the respondents ("Park District") in his third amended complaint. Count I alleged that the Park District discriminated against Alexander with respect to the distribution of park funds and other resources. Counts II and III alleged discrimination in employment and Count IV claimed personal injuries, all of which allegedly arose out of the discriminatory allocation of resources submitted under Count I.

In 1979, a similar case, *Midwest Community Council, Inc. v. Chicago Park District*, 79 C 3187 (N.D. Ill., Sept. 16, 1983), was filed by a different group of plaintiffs. It also was a class action suit brought on behalf of black residents of certain wards of the City of Chicago. The allegations of the *Midwest* complaint focused solely on the allocation of resources issue, claiming that the particular wards inhabited by the class members were afforded less recreational resources and funds than other wards in the City of Chicago.

III. ALEXANDER'S MOTION FOR PRELIMINARY INJUNCTION

On December 2, 1981 Alexander filed a motion for preliminary injunction seeking to prohibit the Park District from implementing its 1982 budget because of the alleged acts of racial discrimination reflected by the Alexander complaint. The motion incorporated a "Report on a Survey of Parks, Personnel, Facilities and Conditions in the City of Chicago", which was dated November 13, 1981 and authored by David Koehler. The report did not mention the Park District budget, but purported to summarize and analyze the results of a "survey" of the condition of 57 Chicago parks conducted from August 27, 1981 to September 5, 1981. Alexander claimed that the survey report established the racial discrimination alleged in his complaint and that an injunction against the implementation of the Park District budget was necessary to prevent further discriminatory conduct.

In respect to the preliminary injunction motion, the trial court heard testimony of several witnesses, lay and expert, tendered by the parties. Alexander submitted the testimony of David Koehler, two of the surveyors, Brian Fogel and Manford Holmes, and Lavern Kron, an alleged budget expert. The Park District presented the testimony of: Terrence Barella, the Director of the Department of Budget Management of the Park District, who testified as to the manner in which the budget was prepared and implemented; Jerome McKinney, the Director of Safety of the Park District, who told of the conditions and safety measures employed in the various parks; Alvin Bielak, an Assistant Supervisor of the Repair and Construction Department of the Park District, who testified as to repair procedures followed in the parks; Dr. Kenneth Mladenka, a professor at Texas A&M University specializing in the analysis of urban services, who was of the opinion that the racial composition of wards in the City of Chicago had not been the determining

factor in the allocation of park resources; and Commissioner Marovitz, who testified as to the lack of any racial considerations in formulating the Park District budget. The court also received documentary evidence from each of the parties.

Additionally, the district court received the deposition testimony of Commissioner Iola McGowan who testified as to her views on the Park District budget. The court also heard from Theodore Jones who was called as a court's witness, and who testified as to his experiences while serving on the Board of Commissioners.

On September 30, 1982 the trial court denied the motion for preliminary injunction and issued findings of fact and conclusions of law. (App. 3). The 81 separate findings of fact and 9 conclusions of law focused on the park survey, and its lack of credibility, and the Park District's evidence, which the court found to be credible. Among other things, the court found that: David Koehler had been a friend of Rufus Cook, Alexander's attorney, since 1958 and was inexperienced in the analysis of parks; a law clerk of Rufus Cook, Judith Richardson, and not Koehler, selected the survey team and coordinated their activities[3]; the surveyors lacked sufficient training; and their standards in judging parks did not remain constant throughout the survey.

As to McGowan and Jones, the court's findings and conclusions were limited to the following:

> "80. There is evidence in the record consisting of the deposition testimony of Commissioner Iola McGowan who testified concerning her twelve point plan for upgrading

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[3] The survey team was to be composed of four disinterested individuals randomly selected from colleges of Chicago, Illinois. It was disclosed that one of the persons chosen to be a surveyor was the wife of Donald Kelly, a photographic consultant and trial assistant to Rufus Cook. Also, subsequent to the survey, Judith Richardson became an attorney employed with Cook and assigned to the instant case.

the parks. Her twelve point program was not addressed to discrimination. She also gave her views on the problems which would be encountered with a per park budget." (App. 3).

"81. Theodore Jones was called as the court's witness. During his tenure as a commissioner, Mr. Jones attended most meetings of the Park District Board. He is personally familiar with several parks. With respect to personnel, he initiated and won approval of an affirmative action employment program. He testified concerning the responsiveness of the Park District to his suggestions which included capital improvements at the South Shore Country Club and Jackson Park, a golf driving range on the south side, funding for the DuSable Museum of African-American history and work at the 31st Street beach." (App. 3).

"7. From the evidence this court has heard, applying the test of credibility and weighing all of it carefully, it does not appear that plaintiffs have at least a reasonable likelihood of success on the merits at trial. The park survey which plaintiffs' lawyer obtained is not credible evidence; it is not probative; it does not show that plaintiffs are likely to recover in this case. This court found it necessary to call as its witness, Mr. Theodore Jones, a member of the Negro race, a civic leader in the Negro community of Chicago, a former president of the Chicago branch, National Association for the Advancement of Colored People. Mr. Jones was neither deposed nor interviewed by the plaintiffs prior to the hearing for the motion for preliminary injunction. This court concludes in evaluating Mr. Jones' testimony that he would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case. He did not. Taking his testimony, together with all of the other evidence this court has heard, this court is satisfied that there is very little likelihood of plaintiff succeeding on the merits at trial in this case." (App. 3).

Alexander appealed the denial of the preliminary injunction motion to the Seventh Circuit Court of Appeals. In

affirming the decision of the district court, the Seventh Circuit criticized the survey:

> "The survey was designed and directed *in absentia* by a political scientist who had no previous experience in the evaluation of park systems and who had no direct contact with those who conducted the survey; the training of the equally inexperienced surveyors was perfunctory and brief; the site visits were hastily conducted over one of the busiest periods of the year; the survey itself consisted of fluid, undefined criteria which not only elicited a single response from two surveyors but also invited substantial shifts in the surveyors' relative evaluation framework and even the *post-hoc* amendment of answers as well as bias from discussions with other surveyors and from the appearance of the surrounding communities; . . .". 709 F.2d at 468 (App. 2).

IV. ALEXANDER'S MOTIONS FOR DISQUALIFICATION OF JUDGE LEIGHTON

On November 12, 1982, Alexander filed motions for the disqualification of the trial judge, the Honorable George N. Leighton, under 28 U.S.C. sections 144 and 455(a). (App. 4). The motions were filed only a few weeks after the district court denied Alexander's motion for preliminary injunction. Only one of the Alexander plaintiffs, Renee Bradford, submitted the motions for disqualification. Her section 144 motion stated that Judge Leighton had a personal bias or prejudice against her, or a bias in favor of the Park District. The section 455(a) motion alleged that the impartiality of Judge Leighton might reasonably be questioned.

The motions for disqualification alleged that the in-court remarks of Judge Leighton during the hearing on the preliminary injunction motion and the findings of fact and conclusions of law demonstrated that the court was persuaded to its decision by the testimony of Jones and McGowan. Alexander contended that the credibility of Jones and McGowan was "enhanced" in the eyes of the court because of their association with the Chicago branch of the National Association for the

Advancement of Colored People ("NAACP"). Alexander stated that there was no basis for the enhanced credibility because, in his view, Jones harmed the Chicago branch of the NAACP. No similar allegation was made against McGowan.

The affidavits submitted by Renee Bradford in support of the motions were based on information and belief and incorporated by reference the affidavits of Earl B. Dickerson, Faith Rich, Lawrence Kennon and Timuel Black, none of whom was a named-plaintiff. The Dickerson affidavit focused on an alleged conversation in 1957 between the affiant and Theodore Jones. The subject of the alleged conversation was whether Jones would be interested in serving as president of the Chicago branch of the NAACP. According to Dickerson, before Jones made a decision on whether he should seek the presidency, he first telephoned Congressman William L. Dawson, then Democratic Committeeman of the Second Ward in Chicago, and obtained his support. The remainder of the affidavit of Dickerson relates his alleged observations when he attended the branch election and supposedly saw a number of persons from Mr. Dawson's Second Ward organization who were present and voting and who had not been known to Dickerson to be members of the NAACP.

In her affidavit, Rich described her efforts, prior to 1957, in working with the Chicago branch of the NAACP in matters relating to education. She claimed that, prior to the election of Jones as president of the Chicago branch, she and her supporters were prepared to negotiate with members of the Chicago Board of Education on the subject of *de facto* segregation in Chicago public schools. She stated that once Jones was elected, the Chicago branch withdrew its support from that activity.

Kennon's affidavit referred to the time period prior to 1958 and to the alleged activities of himself and others on behalf of the Chicago branch of the NAACP in pursuing civil rights matters in Chicago. He referred to efforts relating to a number of institutions in Chicago including the Park District. He

claimed that there were demonstrations and protests in the summer of 1958 against the Park District which were allegedly triggered by the beatings of several blacks who had sought to use the Park District facilities at Rainbow Beach in Chicago. Kennon believed at that time that the Park District was maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities used by whites.

Kennon's affidavit also related his version of Jones' election to the presidency of the NAACP—Chicago branch in the late fall, 1957 and stated that:

> "Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch—NAACP were to be discontinued by Jones in his administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic organization. Mr. Dawson was at that time Ward Committeeman of the Second Ward Regular Democratic Organization, and the publicly acknowledged leader of the Third, Fourth, and Twentieth Wards. Mr. Jones named as his administration chairman of the Legal Redress Committee of the Chicago Branch, and legal advisor to the president, George Leighton, who, on information and belief, was also connected to the Democratic organization in that he had been president of the Third Ward, Regular Democratic Organization, and continued to be active in the Chicago Democratic organization." (App. 4).

Kennon claimed that there were a number of challenges made at NAACP meetings as to the legality and propriety of actions taken under the Jones administration, with George Leighton consistently favoring whatever position had been taken by Jones. The Kennon affidavit concluded with the assertion that "I, and many others who were active in the Chicago Branch NAACP and its units during 1957-1959,

seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people." (App. 4).

The final affidavit incorporated into the Bradford affidavit and motion was that of Timuel D. Black. Black stated that he had read all of what Mr. Kennon had said "and would testify to substantially the same effect if I were called as a witness in this case." (App. 4). He also related his alleged observations concerning the fall 1957 meeting of the Chicago Branch at which Jones was elected president.

Black told of his alleged involvement in activities of the NAACP during Jones' service as president and George Leighton's tenure as Chairman of the Legal Redress Committee. Black stated that he favored various legal actions against the City of Chicago and particularly the Chicago Board of Education on civil rights issues. Black also said that:

> "The actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the organization against its members, and were opposed to the interests of black people and the organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the Board of Commissioners of the Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the NAACP where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party." (App. 4).

V. THE DENIAL OF THE MOTIONS FOR DISQUALIFICATION

On January 7, 1983, Judge Leighton issued a thirty-eight page opinion which denied the motions for disqualification. (App. 5). Alexander filed with the Seventh Circuit a petition

for a writ of mandamus and a motion for a stay of proceedings. The petition and motion were denied on February 8, 1983 and that denial was affirmed on April 4, 1983 in respect to Alexander's petition for an *en banc* rehearing on the petition for writ of mandamus.

VI. THE TRIAL PROCEEDINGS

In May, 1983, Count I of Alexander's third amended complaint, was litigated before a jury[4] in a trial which exceeded three months. Counts II, III and IV were severed for consideration at a later time. Tried at the same time were all claims in the companion case of *Midwest Community Council, Inc. v. Chicago Park District*, 79 C 3187 (N.D. Ill., Sept. 16, 1983). On August 17, 1983, the jury returned a verdict in favor of all defendants and against all plaintiffs and judgment in *Alexander* was entered.[5] Subsequently the court entered judgment in favor of the Park District in *Midwest* and incorporated its own findings of fact and conclusions of law.[6]

On August 29, 1983, Alexander filed a motion pursuant to Federal Rule of Civil Procedure 59 for the entry of an order

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[4] In his brief, Alexander states that no blacks were represented in the jury because of the racial composition of the venire and the Park District's exercise of peremptory challenges. (Alexander Pet., p. 7, n. 3). Alexander fails to tell the Court that the jury included an Hispanic-surnamed individual who was a resident of Chicago (one of Alexander's class members). The remainder of the jury was composed of persons residing outside of the City of Chicago. As to the use of peremptory challenges, Alexander fails to tell the Court that it exercised each of its six peremptory challenges against white persons. Of the six peremptory challenges available to defendants, five were used against blacks and one was used against a white person. Alexander also fails to advise the Court that he never pursued a motion regarding the racial composition of the jury.

[5] Prior to the close of the trial, Alexander moved for a voluntary dismissal of Jones and McGowan and that motion was granted.

[6] The jury was hearing the *Midwest* case in an advisory capacity pursuant to earlier rulings of the trial court.

amending the judgment or granting a new trial. On September 23, 1983, the trial court denied the motion. On that same date the court entered an order disposing of Count IV of the third amended complaint on a summary judgment and dismissing Counts II and III under Federal Rule of Civil Procedure 54(b) so as to allow the parties to take appeal from all orders previously entered in the case.

Alexander did not pursue an appeal, but instead filed a fourth amended complaint. The complaint pled a number of issues, including the claim that the Park District discriminated in its resource allocations. The Park District moved to dismiss the complaint and that motion was granted on October 18, 1984. Alexander appealed to the Seventh Circuit and presented, among other issues, the question of whether the trial court had abused its discretion in denying the motions for disqualification. Although the Seventh Circuit reversed and remanded a portion of the case which dealt with employment discrimination claims, it affirmed the remainder of the district court's ruling, including the decision on the disqualification motions. (App. 1).

REASONS FOR NOT GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION WAS PROPER AND DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE SIXTH CIRCUIT, OR WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

A. THE DECISION OF THE TRIAL COURT, AS APPROVED BY THE SEVENTH CIRCUIT, WAS NOT AN ABUSE OF DISCRETION, BUT RATHER, AN APPROPRIATE DISPOSITION OF FRIVOLOUS MOTIONS DESIGNED TO SAMPLE THE TEMPER OF THE COURT

1. Introduction

It is well settled that the review of a trial court's denial of a disqualification motion is limited to the issue of whether there was an abuse of discretion. *E.g., Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). In the instant case, it is readily apparent that there was no abuse of discretion.

The disqualification motions were based on affidavits which supply rumor, gossip and speculation in the place of fact. At most, the affidavits underscore political and philosophical differences between the affiants and Jones and Judge Leighton with respect to the activities of the NAACP—Chicago Branch over 25 years ago. The relevancy of the motions was aptly questioned by the trial court:

> "One thing, however, is clear: None of these affiants hold Mr. Jones in high regard. And certainly, two of them, Messrs. Kennon and Black, do not think much of this Judge's civil rights contributions to the Negroes of Chicago. But of what relevancy to the issues raised by Mr. Bradford's recusal motion is this review of Mr. Jones' Chicago Branch presidency, and of this Judge's record as a civil rights lawyer?" (App. 5).

The thrust of Alexander's argument to this Court is that the recusal should have been allowed because Judge Leighton "participated pervasively and profoundly in the precise activities [of the NAACP—Chicago Branch] which . . . provide the basis for attacking defendants' credibility." (Alexander Pet., p. 12). Alexander intimates that recusal was necessary prior to the trial on the merits of the case in order to allow him to launch his credibility attack.

What Alexander does not explain is how the alleged 1957-1959 NAACP activities of Jones and Judge Leighton could provide relevant evidence on the issue of Park District resource allocations presented by the preliminary injunction motion or the Alexander complaint. Nor does Alexander tell this Court that during the trial which occurred in 1983, he *voluntarily* moved for the dismissal of Jones and McGowan as to the claims of racial discrimination then pending and that the motion was granted. Alexander took that action because he knew he lacked any evidence against Jones and McGowan. Had Alexander truly believed that Jones was committed to the "disenfranchisement of blacks" (Alexander Pet., p. 13), would he have voluntarily moved for Jones' dismissal? Alexander's current position against Jones, and derivatively Judge Leighton, is being pursued in bad faith and for the sole purpose of manufacturing an argument to this Court on his petition for writ of certiorari.

2. The Trial Court's Denial Of The Preliminary Injunction Motion Was Not Improperly Influenced By Jones' Testimony

Alexander believes that the trial court based its denial of the preliminary injunction motion on the testimony of Jones and, that therefore the allegations which have been made against Jones are especially significant. Alexander ignores the record which discloses that the trial judge relied on a wealth of evidence in rejecting the injunction motion.

The preliminary injunction hearing covered nine days. Each side presented many witnesses, lay and expert, together with hundreds of pages of exhibits and charts. Well over a hundred photographs were admitted into evidence.

Alexander's sole support for the injunction motion was a "survey" which suggested that there were disparities in the cleanliness and maintenance of the parks along racial lines. The survey was authored by David Koehler, a long-time friend of Alexander's counsel. The actual survey was performed by four surveyors who supposedly were randomly picked by the survey coordinator, a woman who at the time was a law clerk for Alexander's counsel and who later became an attorney and was assigned to this case. One of the "randomly" picked surveyors was the wife of a photographic consultant to Alexander's attorney. That consultant testified at trial on behalf of Alexander and assisted Alexander's counsel through much of the trial proceedings.

The survey was found by the trial court and the Seventh Circuit to lack any credibility and that fact, coupled with the expert testimony and other evidence produced by the Park District, resulted in the denial of the preliminary injunction motion. There was ample basis for that decision, even without the testimony of Jones.

The trial court's findings of fact and conclusions of law on the preliminary injunction motion do not support the view that the credibility of Jones was heightened to a level which produced a disqualifying prejudice. The statements of Judge Leighton on Jones merely reflect the background of a witness and the findings of fact and conclusions of law, read as a whole, decided the issues in a precise fashion.

Alexander's disqualification motions attempted to "sample the temper" of the trial court. (App. 5). The trial court did not abuse its discretion in dismissing the frivolous disqualification motions which Alexander filed a few weeks after his prelimi-

nary injunction motion was denied and while the taste of sour grapes was still in his mouth.

B. THE DECISION BELOW IS NOT IN CONFLICT WITH SUPREME COURT OR FEDERAL CIRCUIT LAW AND DOES NOT CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS

This Court has granted writs of certiorari only in cases involving principles "of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals". *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Alexander has not met that burden in the instant petition.

A section 144 motion for disqualification is proper only where there is "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U.S. 22, 33 (1921). As to affidavits in support of the motion, the trial court aptly observed that:

> "An affidavit filed in support of a motion to recuse a judge under Section 144 is not a mechanism by which his civic accomplishments are appraised either for acclaim or condemnation. It is the means, provided by law, for a showing, with particularity, that the federal judge has a personal bias or prejudice either against the movant or in favor of any adverse party. *See United States v. Taylor*, 569 F.2d 448, 450 (7th Cir. 1979); *cf. United States v. International Business Machines Corp.*, 475 F.Supp. 1372, 1379-1381 (S.D.N.Y. 1979) . . .". (App. 5).

As to 28 U.S.C. section 455, a trial judge should disqualify himself:

> "only if the facts provided what an objective, knowledgeable member of the public would find to be a *reasonable basis* for doubting the judge's impartiality. Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid

> adverse decisions by alleging the slightest of factual bases for bias. . . . This restricted mandate to disqualify is calculated to induce a judge to tread the narrow path between timidity and tenacity."
>
> *M.K. Metals, Inc. v. National Steel Corp.*, 593 F.Supp. 991, 994 (N.D. Ill. 1984), *quoting In re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis in original).

The sufficiency of affidavits filed in support of disqualification motions has been subject to strict scrutiny. A noteworthy case is *Hodgson v. Liquor Salesmen's Union Local No. 2*, 444 F.2d 1344 (2d Cir. 1971). That suit, brought under 29 U.S.C. section 482, challenged the election of officers of defendant, a labor union. Shortly prior to trial, the Union presented the trial judge with a disqualification motion which was supported by the affidavit of its president which, in turn, was based on the affidavit of another person. The thrust of the affidavits was that plaintiff's attorney had been overheard speaking to a group of dissident union personnel, stating that he was "very close" to the trial judge.

The trial court denied the motion and that denial was affirmed by the Second Circuit, which stated the following as to the sufficiency of supporting affidavits:

> "However, the trial judge must at the outset determine whether the facts so stated would constitute legally sufficient grounds for recusal, (citations omitted), and if the affidavit is insufficient, he is under just as much a duty to deny the application as he would be to recuse himself if it were sufficient. (Citations omitted). Mere conclusions, opinions, rumor or vague gossip are insufficient. (Citations omitted). To be sufficient the affidavit must set forth facts, including the time, place, persons and circumstances, and, where based upon an extra-judicial statement of the judge, the substance of that statement. (Citations omitted)." 444 F.2d at 1348.

The relationship between trial judges and parties has also been a subject of review by the courts. In *Weiss v. Hunna*, 312

F.2d 711 (2d Cir. 1963), the court focused on a section 455 motion which alleged the judge's common membership with defendant in certain international legal associations and attendance at one or more of their meetings. The court noted that "professional relationships of this sort do not reach the level where considerations of disqualification arise." *Id.* at 714.

Another analogous case decided under sections 144 and 455 is *Warner v. Global Natural Resources plc*, 545 F.Supp. 1298, 1301-03 (S.D. Ohio 1982). In that case, the acquaintanceship between plaintiff and the judge and the fact that the plaintiff had supported the judge's nomination to the bench were rejected as reasons for disqualification. Similarly in *Bumpus v. Uniroyal Tire Co.*, 385 F.Supp. 711, 714 (E.D. Penn. 1974), the court denied a motion for disqualification under section 144 based on the fact that the judge had been a law partner of one of the attorneys more than a decade prior to the action. *See also, In re United States*, 666 F.2d 690, 697 (1st Cir. 1981).

Given this legal background, it is clear that the affidavits which Alexander has provided are grossly insufficient. The Renee Bradford affidavits do not set forth any facts which demonstrate any prejudice against her, but instead rely upon other affidavits. The Dickerson, Rich, Kennon and Black affidavits focus on the activities of the NAACP—Chicago Branch in or about 1957. The affidavits are replete with conclusory allegations, rumors and gossip regarding the NAACP—Chicago Branch, Jones and Judge Leighton.[7]

The Dickerson affidavit relates the association of the affiant with Jones and the speculation of Dickerson as to the circumstances behind Jones' election to the presidency of the NAACP—Chicago Branch. The Rich affidavit demonstrates differences in philosophy between her and Jones in connection with the NAACP. The same is basically true of the Kennon

[7] None of the affidavits mentions McGowan, the other respondent whose credibility was supposedly enhanced in the eyes of the court because of NAACP activities.

affidavit which expresses the opinion that Judge Leighton and Jones did not take sufficient action against the City of Chicago. The Black affidavit is similar. The affidavits should be treated for what they are—political rhetoric of a long past vintage.

Alexander's *sole* citation to a "conflicting" circuit opinion is *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980). A plain reading of *Roberts* distinguishes it from the case at bar. In that case the court, at a pretrial hearing, prejudged the lack of culpability of defendant Graves by stating: "I know Mr. Graves, and he is an honorable man and I know he would never intentionally discriminate against anybody". *Id.* at 127. At no time did Judge Leighton so prejudge the testimony of Jones or any other respondent.

Alexander's other cases are unpersuasive and inapposite. For instance the situation in *In re Murchison*, 349 U.S. 133, 137 (1955), where the court overturned orders of contempt issued by a judge who was sitting as a "one-man grand jury", is not comparable to the facts of the instant case. Moreover, *United States v. Conforte*, 457 F.Supp. 641 (D. Nev. 1978) and *United States v. Zagari*, 419 F.Supp. 494 (N.D. Cal. 1976) are cases which soundly rejected motions for disqualification under 28 U.S.C. sections 144 and 455. None of Alexander's cases supports the view that the past NAACP related activities of Jones and Judge Leighton require the disqualification of that judge with respect to the trial of a case over 25 years later.

II.

THE SEVENTH CIRCUIT DID NOT ERR UNDER CIRCUIT RULE 18 IN REFUSING TO REMAND THE CASE TO A DIFFERENT JUDGE

The appeal to the Seventh Circuit came as a result of the district court's granting of the motion to dismiss Alexander's fourth amended complaint. The Seventh Circuit was not reviewing the appeal of a trial and it has not remanded the case for a "new trial" within the meaning of Seventh Circuit Rule 18. Accordingly, that Rule is inapplicable and does not require a remand to a different judge. The Seventh Circuit has not abused its discretion under that Rule and their decision to return the case to Judge Leighton should not be reversed.

III.

CONCLUSION

For these reasons, the decision of the Seventh Circuit on the disqualification issue should stand. Alexander's petition for a writ of certiorari should be denied.

Respectfully submitted,

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